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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 547759

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HEATHER BENEDICT,

Appellant,

v.

JAMES MICKELSON,

Respondent.

Appeal from the Superior Court of the State of Washington
For Pierce County, The Honorable Bryan Chushcoff
Trial Court Cause No. 18-2-10728-3

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves contract language which conflicts with the laws of intestate succession and the request for declaratory relief therein. The document was created by James Mickelson (“James”) by and through his attorney and Leeanna Mickelson (“Leeanna”), decedent. The petition was filed by Heather Benedict (“Heather”), daughter of James and Leeanna, and heir of the separate property to the Estate of Leeanna Mickelson under laws of intestate succession, to examine the language of the private agreement and what effect if any it has on the distribution set forth by the laws of intestate succession. Because the agreement has a 30-day clause, it is not operational at the time of death and does not trump intestate succession. Heather filed an action for declaratory relief.

The order dismissing the declaratory action is void because it was obtained without the requisites of notice and the opportunity to be heard. The court’s holding is void and should be reversed. The Washington Uniform Declaratory Judgment Act (“UDJA”) expressly allows a party to ask for judicial interpretation of a contract at any time. RCW § 7.24.030. Washington law requires only that there be a justiciable controversy between the parties—which is certainly present here.

Heather was denied due process when the court dismissed her complaint. Constitutional rights, such as due process and equal protection, preserve our judicial system from arbitrary rule. They preserve the trial court’s credibility in the eyes of the public and for litigants. So engrained and fundamental are such rights that statutes and court orders must abide

by constitutional protections. Without being allowed to be heard, her first amendment rights were denied by the cancellation of her appearance by CourtCall, an agent of the court, the court's decision to keep Heather on mute during a subsequent hearing using Zoom. The final order made factual findings.

The Court should reverse the order. And since the attorney fee award was premised on the dismissal of the complaint, it should be vacated as well.

II. ASSIGNMENTS OF ERROR

A. Assignments of error.

1. The trial court erred in entering its April 17, 2020, and April 16, 2021 orders without affording Heather notice and the opportunity to be heard.
2. The trial court erred in dismissing Heather's complaint when her complaint states a claim on which relief can be granted.
3. The trial court erred in awarding James' attorney fees on the basis that Heather filed the action in bad faith.

B. Issues Pertaining to Assignment of error.

1. Whether the April 17, 2020 and April 16, 2021 orders are void because they violated due process rights and an opportunity to be heard?
2. Whether the Uniform Declaratory Judgment Act RCW § 7.24.030 precludes the need to establish there was a meritorious claim?
3. Whether the trial court erred in awarding attorney fees under the circumstances?

III. STATEMENT OF THE CASE

For the sake of the general audience, this background includes information taken from cases related to the Estate of Leeanna Ruth Mickelson to provide a global perspective. The information will not be used as part of the legal argument in this case.

A. Factual background.

On May 1, 2012, Leeanna passed away intestate in Edgewood, Pierce County, Washington State. Surviving her is her spouse James Mickelson ("James"), Appellee, and her four biological children, Erik, Scott, Heather (Appellant), and Gale. Before Leeanna's marriage to James, she was named heir to her grandmother's estate, Elsie Lincoln Benedict (Vandergrift) ("Elsie"), the country's second-highest-paid women's suffrage leader from the late-1910's and a millionaire before she was 30 years old. The Estate of Elsie Lincoln Benedict was comprised of 2,207 AT&T Company capital stock certificates, in which 100 shares were unaccounted at the closing of Elsie's probate in 1974. Elsie was a graduate of Radcliffe (Radcliffe was established in 1879 under the name "Harvard Annex" as an alternative for women denied access to the university) and the University of Denver. An annual scholarship in memory of Elsie exists today at the University of Denver as the "Vandergrift Undergraduate Scholarship in Psychology."

According to the Colorado's "The Great Colorado Payback" unclaimed funds program website, telecommunication stock dividends,

including AT&T, are being held under the name of Elsie Lincoln Benedict on deposit with Colorado's Department of Treasury.

On February 5, 1970, Elsie passed away in San Francisco, California. On February 6, 1970, probate was open (Cause No. 191448), and her last will and testament was filed, naming Leeanna as 30% heir to her estate. Elsie's will contained special bequeathment language, which prevented a spouse from obtaining any interest by granting a life estate to the mother and the remainder to her children. (CP 148-152).

On February 20, 1970, Wells Fargo National Association certified and acknowledged 2,207 shares of AT&T Company, capital stock on deposit with it, "subject to withdrawal only upon order of the Superior Court of California, in and for the City and County of San Francisco, in the Matter of the Estate of Elsie Lincoln Benedict, deceased, No. 191448." (CP 142-146).

On March 14, 1970, James met Leeanna while at a fraternity college party in Southern California. By a dare from his fraternity brothers, James drove Leeanna to Tijuana, Mexico, where they eloped after knowing each other for less than six hours. The outcome of their first marriage is moot. On June 19, 1971, they were remarried in Las Vegas, Nevada. These two marriages come *after* Leeanna was named heir to Elsie's estate, separate property acquired before marriage.

On January 19, 1971, a second inventory and appraisal were conducted in the Estate of Elsie Lincoln Benedict, now with a different

appraiser, certifying that only 2,107 shares of AT&T Company, capital stock were inside Elsie's safety deposit box. Between February 20, 1970, and January 20, 1971, with no order from the Superior Court of California, 100 shares of AT&T Company, capital stock went missing. 100 shares of AT&T Company, capital stock remain missing and unaccounted for today, in which, if found, 30% ownership belongs to Leeanna's Estate, as her separate property.

In late October 2011, Leeanna received a diagnosis of stage 4 terminal cancer and her doctor advised to get her final affairs in order, including writing a will. Leeanna intended to draft and sign a will which would have provisioned her separate and personal property. On October 14, 2011, Leeanna sent an e-mail to her daughter, Gale, stating she intended to write a will soon and asked if there were a few personal things she would like her to have. (CP 196).

On November 3, 2011, James drove Leeanna down to the Luce & Associates, P.S. law firm in Fife, Washington, with the intent to sign her last will and testament. Evidence suggests she was under the influence (CP185-192).

On May 1, 2012, Leeanna passed away in Edgewood, Washington. There was no memorial service upon her passing, and the whereabouts of her cremated remains are unknown.

On April 20, 2016, James recorded the community property agreement with the Pierce County Auditor's Office (Instrument #

201604200219). On April 26, 2016, James recorded an assignment of intellectual property interest that “he may have acquired in the intellectual property of the grandmother of his spouse, ELSIE LINCOLN BENEDICT, by virtue of that certain Community Property Agreement dated November 3, 2011.” (Instrument #201604260417).

On May 8, 2016, Heather received an e-mail from Zachary Luce, a lawyer with the Luce & Associates Law Firm, stating that he was in possession of Leeanna’s original will and would send a copy once he filed it with the court. Later that afternoon, Heather met with Kenyon who confirmed they had Leeanna’s will and said he would mail her a copy. Upon her departure from the law firm, Kenyon called 911 and cited Heather for trespassing.

Under RCW § 11.20.010, “Any person having the custody or control of any will shall, within thirty days after he or she shall have received knowledge of the death of the testator, deliver said will to the court having jurisdiction or to the person named in the will as executor, and any executor having in his or her custody or control any will shall within forty days after he or she received knowledge of the death of the testator deliver the same to the court having jurisdiction.” Yet, no Washington State Superior Court has received Leeanna’s last will and testament, therefore Leeanna died intestate.

Despite there being laws directing the custodian of a will to file it with the courts within thirty days of passing, the Luce & Associates, P.S.

law firm takes on its own approach to this. According WSBA Probate & Trust Listserv post, the firm's owner Kenyon Luce decides whether to bring forth a will or a community property agreement at the time of the first death of a spouse, based on what is most beneficial for the situation for their client¹. Therefore, secreting a will may be allowable under the Luce & Associates, P.S., law office's own internal policies, but violates RCW § 11.20.010.

[WSBAPT] Disclaimer trusts

Guardhi at aol.com Guardhi at aol.com

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Sorry for the confusion. I want my client to have a CPA and a disclaimer trust in their wills. It would seem if it was a will with a mandatory CST and a CPA there would be a conflict. But can we have a CPA and a will with a disclaimer CST in it and then choose which one we want to use at the time of the first death?

On May 16, 2016, Heather petitioned Pierce County Superior Court for an Order of Adjudication of Intestacy and Heirship (Case #1), and Commissioner Kirkendoll signed the order, but never entered into the probate record; it mysteriously disappeared from the clerk's office and never filed. Despite Heather's attempts to restore the missing order, it is still missing today. On July 17, 2016, Leeanna's probate was dismissed.

¹ Source: WSBA WSBAPT -- WSBA Probate & Trust Listserv: <http://mailman.fsr.com/pipermail/wsbapt/2014-February/000714.html>. It is well established the e-mail address of Guardhi@aol.com belongs to Kenyon Luce, owner of Luce & Associates, P.S. Law Firm.

On November 1, 2016, Heather met with Washington State Attorney, Robert Mucklestone, Author of the Washington Probate Practice, Procedure and Tax Manual with Forms (2011) and Partner in the law firm Perkins Coie, LLP, who wrote the guide on how to petition for an intestate probate. Mr. Mucklestone agreed Heather's petition for adjudication of intestacy as statutorily compliant and correct. He was unaware of any case law where a community property agreement could prevail over an order of adjudication of intestacy and heirship. He further noted that closing probate is the appropriate statutory scheme; dismissing a probate as inappropriate and would only occur when someone is actually still alive.

On November 16, 2016, Heather petitioned King County Superior Court and obtained an order adjudicating intestacy and heirship (Case #2), granting Heather 12.5% of Leeanna's separate party, under RCW § 11.04.015. However, it was not long before James appeared and successfully moved the court to vacate this order of intestacy and dismiss probate. On November 16, 2016, King County Superior Court entered an order to vacate its order of adjudication of intestacy and heirship on basis of *res judicata*, that the probate order in Pierce County Superior Court (Case #1) was valid, despite the order having gone missing.

On March 31, 2017, Heather petitioned King County Superior Court for a third probate, now requesting letters of administration. At a hearing with Heather and James present (through his then-attorney

Christina Goeller), King County Superior Court Commissioner Velategui recognized Heather's standing to be able to open a probate, so long as another one is not open, nor closed:

THE COURT: The King County case is dismissed. The Pierce County case is dismissed. There may be an appeal, but that dismissal is good. She can file all the petitions she wants, *seriatim*. And until each one, in turn, is dismissed, she can open them. Now, she can't open this one in the same cause that's been dismissed. She's gonna have to pay a new filing fee.

THE COURT: I'm going to tell you this, young lady. You -- if there's a community property agreement and it's valid, you are playing with fire. And you can't just sit here and tell me, "No, it's not valid." You have to bring a -- you have to bring some sort of legal action to determine it's not. You can't just sit there and say it's not.

On April 3, 2017, King County Superior Court granted Heather with Letters of Administration and entered an order that Leeanna passed away intestate (Case #3).

Separately, James filed a lawsuit against his only other daughter, Gale McArthur, alleging a debt was owed to the Estate of Leeanna Ruth Mickelson (Case #4). This matter was settled outside of court.

On August 22, 2018, Heather filed this declaratory relief action in Pierce County to determine the validity of the community property agreement and alleges fraud, forgery, undue influence, coercion, along with its self revoking, inconsistent verbiage in the agreement, which is now before this Court (Case #5).

No other petition, requesting declaratory relief on the community property agreement has been filed and thus, no determination on the

outcome of the community property agreement's effect on the April 3, 2017, King County intestate order has been established.

On April 16, 2020, Heather received James's motion to dismiss this declaratory relief action and notice of the April 17, 2020 hearing. (CP 318).

B. Procedural History

On May 16, 2016, Heather petitioned the Pierce County Superior Court for an adjudication of intestacy and heirship (Case #1). Commissioner Kirkendoll granted Heather's petition and entered an oral order recognizing Leeanna died intestate and she and her three siblings were entitled to equal shares of half (50%) of Leeanna's separate property under the Washington State laws of intestate succession. Despite a duces tecum subpoena issued on June 3, 20216 on the law firm, Luce & Associates, P.S., none of Leeanna's estate planning documents have been provided to any heirs, including the original instrument of either a will or valid community property agreement.

On June 17, 2016, during a motion to produce a will, Pierce County Superior Court Commissioner Dicke dismissed probate with prejudice, noting there was no legal authority for a petition to produce a will to move forward, ignoring RCW § 11.20.10, which requires a custodian of a will to deliver it to the court.

It was only after Commissioner Dicke made her dismissal ruling that Kenyon presented a questionable community property agreement to the court, alleging it was an original, but disallowed any heirs from

inspecting the original document. Heather was only provided a quick glance of the document in which she saw many irregularities in it, such as Leeanna's signature was in black and James's was in blue. Since Leeanna's signature was in black, it is possible it was a photocopy of her signature and not an original. Since probate had been dismissed when it was admitted, it is factual to say that the original community property agreement has never been admitted into any *open* probate as evidence.

On July 13, 2016, Heather filed for a motion for revision in attempt to vacate the dismissal and restore Commissioner Kirkendoll's missing order from May 16, 2016. On July 22, 2016, Judge Murphy declined to hear the revision because he believed the Court of Appeals Division Two held jurisdiction over the matter. On October 24, 2017, the Court of Appeals Division Two filed its opinion and on December 28, 2017, the matter was mandated back down to the Pierce County Superior Court for further proceedings. Heather's preserved motion for revision from June 17, 2016, on the order of dismissal is noted for January 21, 2022 before Judge Burton.

On November 14, 2016, Heather petitioned King County Superior Court (Cause No.16-4-06644-2) for the same adjudication of intestacy and heirship from Pierce County, and a written order was entered naming her 12.5% heirship to Leeanna's separate property. When King County Superior Court recognized Pierce County Superior Court had already entered the same order, albeit a verbal order of intestacy since the order is

still missing, Commissioner Velategui vacated the order and sanctioned Heather, noting there was *res judicata*; he recognized that the *oral order* from May 16, 2016 of Commissioner Kirkendoll adjudicating 50% of Leeanna's separate property to her children *as valid*. On January 3, 2017, King County Superior Court dismissed probate.

On March 31, 2017, Heather petitioned King County Superior Court to open a new probate again, but first time asking to appoint an administrator of the estate. During an ex parte hearing with James's attorney present, Commissioner Velategui recognized that if there was no other probate was open, anyone could walk off the streets and open a new probate. If there is a question to the validity of a community property agreement, then separate litigation could be filed, but probate was not the place to challenge the validity of a community property agreement.

On April 3, 2017, in King County Superior Court (Cause No. 17-4-02196-0), Judge Ramsdell entered an order of intestacy and named Heather as the Personal Representative and awarded her with Letters of Administration. While the decision of Heather to serve as the personal representative was later reversed and granted to James, the order of intestacy remains today. The order did not adjudicate heirship.

On August 22, 2018, Heather filed this declaratory relief action in Pierce County in an attempt to determine the validity of the community property agreement and she alleges fraud, forgery, undue influence, coercion, along with self-revoking, inconsistent verbiage.

On November 8, 2019, Heather filed a Statement of Arbitrability. James did not file an objection or other response to Heather's statement of arbitrability.

On March 30, 2020, Heather filed a motion to compel arbitration and served all parties for a hearing noted for April 10, 2020.

On April 1, 2020, the court entered a *sua sponte order* granting Heather's motion.

On April 8, 2020, without a motion from either party, the court entered a *sua sponte order* vacating the April 1, 2020 order, finding that the April 1st order was "improvidently entered in the mistaken belief that the order was agreed up on by the parties."

On April 16, 2020, Heather filed four motions: motion to disqualify a judge, stay proceedings, change of venue, shorten time, and notice of King County Superior Court probate, and noted her hearing for April 17, 2020. She received confirmation from CourtCall that she would appear remotely using their system.

On April 17, 2020, prior to the hearing, Heather logged onto CourtCall but could not appear, the only option she given was to continue the hearing and as such, the continuance was granted. Heather contacted CourtCall's moderator who again confirmed the continuance was granted, there was nothing else for her to do. The court was notified in real-time of this action by CourtCall to continue the hearing, but proceeded to enter a

default order without Heather being able to appear and entered finding of facts.

On April 30, 2020, the court entered an order denying Heather's four motions (filed on April 16, 2020) on the basis that the case was already dismissed. The court never heard Heather's motions before it dismissed the case.

On April 16, 2021, Heather moved the court to vacate its default order and hired an attorney, Paul Barrera, to represent her for this motion. Judge Chushcoff recognized the irregularities of the prior proceedings and asked to state a meritorious claim. Mr. Barrera asked the Court to hear from Heather but was denied this request and she was kept on mute. Heather appeared remotely via Zoom but was kept on mute by the court and she was unable to be heard. Heather used Zoom's chat feature to request that the court take her off of mute and was denied her request to be heard. Heather held up a sign on her video camera requesting a breakout session with her attorney and was denied. Heather did not authorize Mr. Barrera to speak on her behalf about the question of a meritorious claim, therefore, he did not. Judge Chushcoff was unsatisfied with Mr. Barrera's response, that the court needed to hear from Heather, thus denied the motion to vacate the April 17, 2020 order.

On April 26, 2021, Heather filed a motion for reconsideration and legal memorandum, requesting oral argument, and her motion was denied. Within her pleadings, she outlined the meritorious claims which she hoped

to be able to articulate in a court but had been denied the opportunity to be heard both at the April 17, 2020 and April 16, 2021 hearings.

On November 5, 2021, James sent Heather a notice of probate and pendency of proceedings, stating that on May 3, 2017 probate proceedings were open, three years after the statutory requirements of notice, and that he was the personal representative of the estate.

On December 16, 2020, King County Superior Court Pro Tem Commissioner Velategui entered a *sua sponte order* dismissing probate and discharging the personal representative. There was no motion for dismissal and no notice to the heirs. This dismissal of this probate is pending the Court of Appeals Division One.

On October 12, 2021, Heather petitioned Pierce County Superior Court for adjudication of intestacy and heirship (Cause 21-4-02178-5), the same petition from May 16, 2016, where the order of adjudication of intestacy and heirship was never filed by the clerk's office. The court entered an order of deficiency, stating notice is required to all heirs before an order of adjudication of intestacy can be entered and is now pending an appeal from the Court of Appeals Division Two.

IV. STANDARD OF REVIEW

This Court reviews an order dismissing a complaint under CR12(b)(6) de novo. *See Wash. Trucking Ass'ns v. State Emp't Sec. Dep't*, 188 Wn.2d 198, 207, 393 P.3d 761, 766 (2017). "Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery. All

facts alleged in the complaint are taken as true, and [the court] may consider hypothetical facts supporting the plaintiff's claim." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29, 34 (2014) (citations and quotation marks omitted); *see also* *Headspace Int'l. LLC v. Podworks Corp.*, 5 Wn. App. 2d 883, 889, 428 P.3d 1260, 1263(2018), *review denied*, 192 Wn.2d 1027, 435 P.3d 269 (2019). "[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff's claim." *Jackson v. Quality Loan Serv. Corp. of Wash.*, 186 Wn. App. 838, 843, 347 P.3d 487, 490 (2015). In addressing a motion to dismiss, "the trial court may consider only the allegations contained in the complaint and may not go beyond the face of the pleadings," *id.* at 844, 347 P.3d at 491, though it may also consider documents referenced in the complaint, *see McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25, 29 (2016).

This Court "review[s] the legal basis for an award of attorney fees de novo and the reasonableness of the amount of an award for abuse of discretion." *Hulbert v. Port of Everett*, 159 Wn. App. 389, 407, 245 P.3d 779, 788 (2011).

V. ARGUMENT

A. The void orders dismissing this action should be vacated because they violated the due process requirements and opportunity to be heard.

The April 17, 2020 Order Finding of Facts, Sanctions, and Dismissal of the case violated Heather's constitutionally granted due process and insufficient notice. She was not given meaningful notice as she received notice in the mail and had less than one day to prepare (CP 318). It is fundamental that a person must receive adequate notice and opportunity to be heard before an order or judgment can be entered against her. *In re Marriage of Maxfield*, 47 Wash. App. 699, 704, 737 P.2d 671,674 (1987); *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185, 1188(2006); *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976); *Olympic Forest Prods. v. Chaussee Corp.*, 82 Wn.2d 418, 422,511 P.2d 1002, 1005 (1973). If procedural safeguards are inadequate, a court lacks jurisdiction over a party and cannot enter a valid order against him. *Maxfield*, 47 Wash. App. at 704. Any such order is void. *Id.* at 706.

Under Pierce County Local Rule (PCLR) 7(a)(3)(A), motions are scheduled for hearing by filing a note for motion docket. The note must be "filed with the motion and supporting documents and served upon the opposing party at the same time." Heather received notice in the mail on April 16, 2020. (CP 318). The filings do not include a declaration of mailing.

Heather did not agree to service by e-mail. She may utilize LINX to file pleadings, but did not opt-in to use it for electronic service.

Electronic service is optional for self-represented parties, under Pierce County Local General Rule (PCLGR) 30(b)(5), which states:

Electronic Filing Is Mandatory for Attorneys and Optional for Self-Represented Parties...Self-represented parties are not required to e-file documents but may contact the Clerk's Office to obtain a LINX account and password to enable e-filing and e-service.

Further, Heather and was barred from appearing by the court's agent, CourtCall, the exclusive remote appearance provider for Judge Chushcoff. Pierce County Emergency Order #4 was in place which limited in person appearances; therefore, the only way Heather could appear for the April 17, 2020 hearing is by using CourtCall, there was no alternative provided to her. CourtCall admits fault that Heather's appearance was cancelled. (CP90-91):

I ended up cancelling the [Heather's] appearance scheduled with Judge Chushcoff so you [Heather] could receive a refund however my mistake was that I failed to rescheduled [sic] you again for free. The mistake was on our end and not you.

At the April 16, 2021 hearing, the court kept Heather on mute and was not allowed to provide the information the Court said it needed. This is evidenced in the April 16, 2021 Transcript:

MR. BARRERA: I'm appearing on a limited appearance for Heather Benedict's motion to vacate. (4/16/21 RP at p.6, line 3-5).

MR. BARRERA: The point here is that the Constitution does require that she has an opportunity to present her case. (4/16/21 RP. at p.7, line 24-25).

THE COURT: Why not address the merits today? (4/16/21 RP at p. 9, line 8-12).

MR. BARRERA: Ms. Benedict has the transcript she wants to explain. (4/16/21 RP at p. 19, line 12-15).

THE COURT: Ms. Benedict, you're representing. I know you have raised your hand but I'm not going to hear from you. (4/16/21 RP. at p. 23, line 20-21)

THE COURT: Ms. Benedict you are represented by counsel and have no right to talk to me at this point. (4/16/21 RP at p.44, line 24-25)

The court denied Heather's written request for a breakout session with her attorney to provide the necessary authority to respond to the court's question about "meritorious claims" associated with the complaint. The court said Heather had no right to speak to the court directly since she had an attorney, but then refused to allow her momentary leave to provide her attorney with what was necessary, thereby blocking her from providing the information.

There need not be an extended argument to conclude that the lack of meaningful notice and opportunity to be heard violates the fundamental principles of due process.

B. Under the Uniform Declaratory Judgment Act, the mere existence of the private contract gives sufficient grounds for a declaratory action and survives a 12(b)(6) motion

The trial court dismissed the complaint because it concluded that Heather's failed to prove her mother's endorsement of the Community Property Agreement as in any way involuntary or incompetent or otherwise indicated in what way the Community Property was of no legal effect, and it believed that both are "essential" to Heather's claim. Under Washington law, however, it is not necessary to state a claim for a

declaratory judgment. The dismissal, therefore, was error, and the judgment and attorney fee award should be reversed.

A provision of the Uniform Declaratory Judgements Act (UDJA) makes this evident. The statute authorizes an action to address “any question of construction or validity of a contract, under RCW § 7.24.020:

A person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder.

In sum, damages were not required for Heather’s to allege a viable declaratory judgment claim under the UDJA, and the trial court erred in dismissing her claim.

A meritorious claim is not required in order to allege a declaratory judgment claim. The only prerequisite to asserting a UDJA claim is the presence of a justiciable controversy. See *W. Coast Pizza Co. v. United Nat’l Ins. Co.*, 166 Wn. App. 33, 37 n.2, 271 P.3d 894,897 n.2 (2012). As the Washington Supreme Court has explained:

The elements of a justiciable controversy under the UDJA are: (1) parties must have existing and genuine rights or interests; (2) these rights or interests must be direct and substantial; (3) the determination will be a final judgment that extinguishes the dispute, and (4) the proceeding must be genuinely adversarial in character.

Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 186, 157 P.3d 847,853 (2007).

James never contended that the justiciable controversy standard was not satisfied.

In short, there is very much a live dispute between the parties over which the trial court had jurisdiction.

C. The attorney fee award is not warranted under these circumstances and should be reversed.

James is not entitled to attorney fees. In its order granting James attorney fees, the trial court cited no statute, no rule, and no case and it articulated no standard for the award of fees. Instead, the court found only that the case was filed “as part of a vexatious pattern of litigation activities.” The trial court articulated bases for this finding: (1) “[Heather] fails to state a claim upon which relief can be granted” and (2) This is the fifth superior court case filed by [Heather] regarding this issue and filing separate lawsuits based on the same event is precluded in Washington.”

Yet, this finding of *res judicata* is factually incorrect. Prior cases were probates, filed under RCW Title 11 Probate and Trust, asking to adjudicate the Estate of Leeanna Mickelson; this the first and only case filed under RCW § 7.24 Uniform Declaratory Judgments Act and therefore, no *res judicata* exists. No superior court in Washington State has entered a decision on the effect of an intestate estate and a community property agreement; this conflict still exists today.

None of the trial court’s holdings support the attorney fee award. As demonstrated above, the first reason is wrong as a matter of law. In any event, that reason hardly shows “bad faith” –otherwise any dismissal for failure to state a claim would be sanctionable.

The second reason does not support a fee award either. Attorney fees based on “substantive bad faith,” as James sought, are available when a “party intentionally brings a frivolous claim, counterclaim, or defense with improper motive.” *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 929, 982 P.2d 131, 136 (1999); see also *In re Recall of Piper*, 184 Wn.2d 780, 786–87, 364 P.3d 113, 115 (2015) (“In any civil action, a court may award attorney fees if the action was frivolous and advanced without reasonable cause.”). “Bringing a frivolous claim is not enough, there must be evidence of an ‘intentionally frivolous [claim] brought for the purpose of harassment.’” *Rogerson Hiller Corp.*, 96 Wn. App. at 929, 982 P.2d at 136 (quoting *In re Pearsall-Stipek*, 136 Wn.2d 255, 267, 961 P.2d 343, 349 (1998)). “[B]ad faith is defined as ‘actual or constructive fraud’ or a ‘neglect or refusal to fulfill some duty. . . not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.’” *Bentzen v. Demmons*, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015, 1022 n.8 (1993). Heather’s case against James is the only declaratory relief action and it is not frivolous and there is no evidence of “improper motive.”

Heather’s claim is not frivolous for the reasons explained above: under settled law, it survives a motion to dismiss. “An action is frivolous if it ‘cannot be supported by any rational argument on the law or facts. *Eller v. E. Sprague Motors & R.V.’s, Inc.*, 159 Wn. App. 180, 191, 244 P.3d 447, 453 (2010); see also *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ.*

Pers. Bd., 107 Wn.2d 427, 443, 730 P.2d 653, 661 (1986) (holding that a claim is frivolous “if there are no debatable issues upon which reasonable minds might differ”). If this Court reverses the dismissal, that alone refutes any finding of frivolousness. See *In re Cooke*, 93 Wn. App. 526, 530, 969 P.2d 127, 129 (1999). “A litigant has the right to go to court and litigate a nonfrivolous claim or defense.” *Greenbank Beach & Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 527, 280 P.3d 1133, 1139 (2012).

VI. CONCLUSION

This Court should reverse the judgment and the order awarding attorney fees and remand the case for further proceedings.

Respectfully submitted this 15th day of October, 2021.

Heather Benedict
Heather Benedict, Appellant
In propria persona

VII. CERTIFICATE OF MAILING

I certify that on 10/15/2021, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: F. Hunter MacDonald, Attorney for James Mickelson, Defendant, 707 South Grady Way #600, Renton, WA 98057-3227.

Heather Benedict
Heather Benedict, Appellant

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